ing. The temples to Honor, Virtus, Pavor, and Pallor, Fortuna and Pudicitia, illustrate that capacity of generalizing, and of reducing all actions to law, which all admit to be a marked characteristic of the Romans. The second is a relic of the lower stage, represented by the gods of the *Indigitamenta*, who are themselves intermediate between fetichism and polytheism. Ajus Locutius, who warned of the approach of the Gauls; Deus Rediculus, who caused Hannibal to turn back, — gods like these are but a step beyond the fetich.

The rest of the chapter under consideration is excellent in every way; especially that portion of the second section which treats of the relation of Church and State in ancient Rome. This is in general a development of Cicero's eulogy upon the founders of the state for placing the religious and political functions in the same hands. We will add that this wisdom consisted especially in the point that the state religion was administered by statesmen, rather than the commonwealth by priests; in this lies the great contrast between the civilization of Egypt and that of Greece and Rome, or, to take an example from our own time, between the State religion of modern Rome and that of England.

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6. — 1. *Paul Laband. Die vermögensrechtlichen Klagen nach den sächsischen Rechtsquellen des Mittelalters.* Königsberg.

2. *Heusler. Die Beschränkung der Eigenthumsverfolgung bei Fahrhabe und ihr Motiv im deutschen Recht.* (*Festschrift zu Homeyer's fünfzigjährigem Doctorjubilaeum.*) Basel. 1871.

In a recent number of this Review * an attempt was made to describe the earliest German legal procedure, as it has been explained by the labors of recent German jurists. One branch of this procedure concerns what is there called the vindication of personal property, and is, in the history of modern law, by no means the least interesting. The works above cited furnish the means of continuing the investigation down through the difficult and confused period of the Middle Ages, so far as concerns Germany; although in order to offer a complete evolution of the law in all the continental countries which felt the influence of Germanic institutions, it is necessary that the reader should pursue some further investigations into the old French and Norman sources. By doing so, one may easily embrace the entire development of an important branch of law both in Ger-

* See the North American Review for April, 1874. Thévenin. Procédure de la Lex Salica: Traduction de l'Allemand de Rudolf Sohm.

many and in France, anterior to the introduction of Roman jurisprudence. English students may judge for themselves whether or not this investigation throws light upon the character of their own law.

The fact that a chattel has passed from the possession of an individual against his will, gives rise to an action *in rem scripta* for the benefit of the party dispossessed. The principle which lies at the root of this action is thus formulated by Laband, according to the German and especially the Saxon sources of the Middle Ages: "No one can acquire any useful right to a chattel, as against the possessor of that chattel, when the possessor has been dispossessed against his will." This principle, which Laband has deduced with much legal subtlety from the original German sources, is also to be found in the richest mediæval French and Norman authorities. It is therefore very interesting to compare the Sachsenspiegel, the Customs of Magdeburg, Freiberg, Goslar, etc., with the Assises of Jerusalem, the Conseil de Pierre de Fontaines, the Établissements de St. Louis, etc.

The principle thus stated indicates, 1. The legal ground of the plaintiff's claim; 2. The nature of the defendant's defence; 3. The mode of proof. Each of these three points is the object of an elaborate study in Laband's work. Before examining them, however, he describes the acts which must precede and introduce the action. In comparison with those earlier forms already alluded to in the procedure of the Lex Salica, it seems as though the law in its development lost what may be called its formal richness, to gain in abstraction. In the Saxon sources these preparatory acts are reduced to very little; in the French, they have almost disappeared. According to the Assises de Jerusalem and the Établissements, the party who has been dispossessed follows his chattel and arrests it, that is to say, seizes it, in order to affirm in a tangible manner the identity of the chattel found with the chattel *desmané*. The parallelism of the German and French sources is made obvious by a comparison between this "following" of the chattel, and the *vestigium sequi* of the Lex Sal. et Rip., or again between the expressions "trouver *sur* un homme" and "*super* hominem invenire," and finally between the French *arester* and the Saxon *anevangen; desmané* and *abhanden gekommen*. Once the chattel has been so *aresté*, the dispossessed party resumes possession of it, if the actual possessor does not gainsay it; if he does, the issue is made. There is then a first extrajudicial summons before witnesses, to restore the chattel; then a judicial summons. It is to be remarked that according to Laband, as also according to the old French customary law, the summons is to be made according to a certain fixed

formula, in connection with which it is well to compare Brunner's *Wort und Form im altfranzösischen Process.* The last words of the French form, "donc vous defent ge *de par le seignor,*" mark the growth of the judicial authority; the private authority which was sufficient for the *Leges barbarorum* is here reduced to the second rank.

The dispossessed party can now only claim the assistance of the judge; that is, begin his action. Laband has admirably explained the character of the mediæval German action: "Der Begriff der deutschen Klage ist die Anrufung der richterlichen Hülfe, dem Kläger das zu verschaffen worauf er anspruch erhebt." The same idea characterizes the action of the old French law. The plaintiff invokes the *assistance* of the judge: "et vos pri et requier que voz me *faites dreit*" (Ass. Jer.). The action has, however, no particular name; the sources simply state the concrete fact of dispossession, whether loss, theft, or otherwise.

We now come to the most delicate point of Laband's work, and one which we cannot but consider to have been particularly well treated. Many jurists, as is well known, have already gone into the study of possession, and of its legal effects both in ancient and modern law. A jurist of considerable repute, Bruns, has treated the subject of actions for the recovery of personal property, in his work, *Das Recht des Besitzes,* as a part of the Law of Possession. Writers on ancient French law have either neglected this subject of the "*vindication mobilière,*" as it is termed, or have not sought for the foundation on which it rests. On this point too, Warnkönig, in his *Französische Rechtsgeschichte,* is either insufficient or inexact. Bruns, and with him most of the German legal historians, believes that the action for recovery of chattels is founded in the right of property, or at least in a right of detention derived from the proprietor. Laband completely upsets this theory, and shows that this action is founded solely on the fact of the *involuntary* loss. His demonstration in regard to German law is supported by applying to it the test of comparison with the old French Customs, — before any Roman influence came to affect profoundly the normal development of our institutions, — by which it will appear that the action in question rested there, too, on the fact of the involuntary loss, and on that alone. This matter is so curious and important, not merely as pure law, but as a part of the history of the right of property itself, that it is worth a moment's examination.

1. The plaintiff's enumeration of facts is double: (*a*) he had the chattel in his possession; (*b*) it went out of his possession against his will. These are the only relevant facts which are admitted to proof.

The proof, both according to the Saxon sources and the Assises de Jerusalem, separates itself into two elementary proofs; the claimant swears that the object passed from his possession in consequence of a fact independent of his will (Laband, p. 109 ff.), and similarly in old French law the claimant swears that he has lost the object *outre son gré*. Further, the fact of the anterior possession is to be proved, according to the French sources, by two witnesses who have seen the claimant "saisi et tenant comme dou sien," that is to say, in *possession* of the object, while the Saxon sources differ in regard to the mode of administering this latter elementary proof. Thus, according to the Sachsenspiegel, the claimant must take oath to the two affirmations set forth, with two witnesses (Wissenszeugen) who have seen him in possession, while other sources exact only the oath of the claimant alone. In either case the principle laid down by Laband, and verified by the French Customs, holds good.

2. As to the means of which the defendant may avail himself for his defence, they are clearly indicated, and result from the principle above mentioned. It is a mistake to suppose, as some writers have done, that the defendant could make no good defence, — without being convicted of theft, — unless he averred that he was lawfully possessed of the article in question. This is again the same mistaken conception of the action for recovery of a chattel, according to which both claimant and defendant would be obliged to establish the existence of a right of property, or at least of some real right in the thing. This is the modern conception of the personal action, not at all the conception of mediæval law. Without following Laband into his examination of the particular cases, and without detailing the means of defence which may be successfully employed by the defendant, it is enough to add to what has been already said, that the defendant has the alternative of proving either; (*a*) that the claimant has not been dispossessed of the article in dispute; or (*b*) that, if dispossessed, it was with his own free will and consent. Thus it appears that, neither by the old German law nor by the French Coutumes, was the defendant held responsible, if he could establish that the claimant had made a voluntary transfer (*avec son congié*, in the French) of the article in question. Another good defence is where the defendant can prove that he received the object from his adversary himself by sale, gift, etc., or, again, where he can prove that he himself fabricated the object or bred the animal in litigation. But it is to be observed that the defendant does not pretend a right of original property based on the fact of production. The fact of production, when established, results in absolutely overthrowing the allegation of

the claimant, "I lost possession against my will," but does not raise the question of property. Both in the defence and in the claim the parallelism is complete between the German sources and the old French Customs, at least in those points which are treated by each, although the former are much the more complete in their treatment. Reciprocally there can be found in neither any example of a plea in defence which tends to the direct establishment of a right of property or even of any real right whatever for the benefit of the defendant.

In order properly to understand the system on which the oath is administered, and the principle on which the defence rests, according to Laband's theory, which seems alone to conform with the authorities, it is indispensable that the student should be thoroughly familiar with the principle on which the claim is supported, and which has been briefly indicated above. To sum it up in a precise form: the claim (the *aveu* of the French *coutumiers*) is the putting in action, for the benefit of the claimant, of a right derived from the fact of involuntary dispossession; not, as in the Roman law, the putting in action of a right of property, or more generally of a real right, in consequence of which the claimant ought to possess the chattel. With this clew it is easy to disentangle the principle which is to serve as the defendant's guiding rule. It may be stated thus: The defendant is allowed to offer every defence or exception which tends to prove: 1st. That the claimant has not been dispossessed of the articles in question; or, 2d. That if dispossessed, he has been voluntarily dispossessed: and since these forms of defence are the only ones which destroy the adversary's allegations, it is to be added that he can offer these and no others. On this ground of the defence it is also very interesting to compare the ancient French *coutumes* with the Sachsenspiegel and the Saxon customary law in general. Like the German writers, the French authors who have handled this subject, Warnkönig, Ortlieb, etc., have missed the theory of the defence. Warnkönig, for instance, says (II. 336): "Der Beklagte kann sich alsdann wofern er nicht as Dieb dastehen soll, nur dadurch vertheidigen dass er behauptet auf rechtmässige Weise in den Besitz jener Sache gekommen zu sein." This is the Roman conception. So Ortlieb, (p. 88): The defendant "pouvait prétendre qu'il avait légitimement acquis la chose," has fallen into the same error. Laband has not insisted strongly enough on the defence. There are points in the Saxon authorities on which he has not laid weight enough. He has done well to arrange in two distinct groups the forms of defence that the defendant may offer: (*a*) those defences which, presented and conducted in the prescribed forms, aim to overthrow the claim funda-

mentally; which are the only defences proper; and (*b*) those which, while leaving the action itself untouched, aim to free the defendant from the charge or even the suspicion of theft.

3. As for the proof, it is administered according to the general principle laid down in the foregoing pages. The right to bring proof belongs to the claimant, who has demanded the aid of the judge. Sometimes he proves by his single oath, sometimes assisted by two witnesses, according to the nature of the case and the custom of the country. If the defendant sets up a good defence, he proves in his turn, either alone or with witnesses. In both cases the right to prove is given by judgment. This follows the old Germanic principle. Laband does not, however, enter into any discussion of the character of proof as shown by the sources of German law, — a discussion which would be out of place in a doctrinal essay on actions, — but contents himself with using the results obtained on this point by the previous investigations of von Bar, Planck, etc., which he applies to each particular case examined.

Under the title of *Die Beschränkung*, etc., Professor Heusler examines the interesting case of revindication of chattels which is found in the Sachsenspiegel, II. 60, § 1, and which may be reduced to the following formula: The person who allowed another to hold his chattel could not recover it as against a third party, whether the chattel had come into possession of this third party by virtue of a form of law, by delivery, by forfeit, by embezzlement, or by theft. Heusler's work completes that of Laband in so far as it investigates the reason of the rule of law above given. This rule is nothing else than the German legal doctrine, "Hand muss Hand wahren," presented in a concrete form. The author traces to the Salic Law the origin of the restriction so imposed, and develops the idea that according to that law there was no civil procedure except in the case of *fides facta* and *res prestita*. The judicial pursuit of chattels which have passed out of possession (*desmanés*) was unknown; the Intertiation procedure has already lost the character of a purely executive procedure, and belongs henceforward to a period of subsequent law. If this be admitted, it must have been originally impossible to pursue a chattel wrongfully taken away or detained, unless by covering up the claim in the form of the pursuit *ex delicto*. But this criminal action did not belong to the proprietor, but to the party who had the article in trust. This is certainly an idea which deserves attention, especially when connected with Sohm's theory on Salic procedure. Nevertheless, it can hardly be said that the passages *De vestigio minando* and *De filtortis* of the Salic Law have yet received a complete

explanation. For illustration here, too, it is interesting to compare Ssp. II. 60, § 1, with Beaumanoir, Coutumes de Beauvoisis, 38, 2, and 31, 16: "Se une coze est louee a aucun et ele est emblee, le porsuite en apartient a celi qui le loua, car il est tenus au rendre le coze qui li fu louee." If a thing is let out to any one and is stolen, the pursuit of the thing belongs to the one who hired it, for (and this indicates the legal motive) he is obliged to return the thing which was let out to him. After what has been said above, there is no occasion to enter in detail into the results offered by this work, which are not essentially different from those of Laband.

Hereafter it may be of use to the more abstruse students of law, as approached from the historical side, to examine into the nature of real actions in the old German and especially Saxon sources, and to connect with these a comparison with the oldest French authorities. On this subject also the works above mentioned, as well as others of the existing German school, throw much light. M. T.

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7. — *A Short History of the English People.* By J. R. Green, M. A., Examiner in the School of Modern History, Oxford. With Maps and Tables. London: Macmillan & Co. 1875.

It is difficult to speak of this book in any other terms than those of unqualified praise. Its learning, its style, its imagination, and, almost above all, its sound common-sense, are most remarkable. Readers of this Review will readily acquit its criticisms of any tendency towards indiscriminate laudation, and may therefore be less disposed to scepticism if the critic for once frankly begins by asserting that Mr. Green cannot be ranked among contemporary English historians second to any one but Macaulay himself.

Never has the popular style of historical writing been raised to so high a standard as in Mr. Green's work. He has hit a curiously happy vein of picturesque, yet unaffected narration. As an example, one among hundreds, here is a description of the mental state of England at the time of Wat Tyler's rebellion, about the year 1380: —

"The cry of the poor found a terrible utterance in the words of 'a mad priest of Kent,' as the courtly Froissart calls him, who had for twenty years been preaching a Lollardry of coarser and more popular type than that of Wyclif, and who found audience for his sermons, in defiance of interdict and imprisonment, in the stout yeomen who gathered in the Kentish churchyards. 'Mad,' as the land-owners called him, it was in the preaching of John Ball that England first listened to the knell of feudalism and the declaration of the rights of man. 'Good people,' cried the preacher, 'things will never go